No.....

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN FARLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN FARLEY,

Appellee.

BRIEF OF APPELLEE AND APPELLANT, UNITED STATES OF AMERICA

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JURISDICTION

This is an appeal from a final decree entered by the District Court in admiralty on March 23, 1956. A decree was entered in favor of libelant-appellant and a notice of appeal by United States of America and order allowing appeal were filed and entered on June 20, 1956. Libelant-appellant appealed on the ground that the

award was inadequate, and respondent-appellant, United States of America, appealed from the entire decree.

This brief combines the answer of United States of America to the brief for appellant, John Farley, and the opening brief in its appeal from the decree.

STATEMENT OF POINTS ON APPEAL

1. The District Court erred in overruling appellee's exceptions to the libel.

2. The District Court erred in holding (a) that the libel stated facts sufficient to constitute a cause of suit against appellee, (b) that it had jurisdiction to hear and determine this suit, or (e) that it had jurisdiction over the person of appellee.

3. The District Court erred in holding that the sole proximate cause of appellant's injuries was the negligence of appellee's servant Potts.

4. The District Court erred in finding that at the time of the accident appellee's employee Potts was acting within the scope of and in the course of his employment.

5. The District Court erred in holding that no acts or failure to act on the part of libelant proximately caused or contributed to his injuries.

6. The District Court erred in failing to find that appellant was negligent (a) in disregarding his duty to warn Potts of the danger of climbing the ladder with his hands encumbered, (b) in failing to keep a lookout for

his own safety, and (c) in standing at the foot of the ladder while Potts was ascending with hands encumbered.

7. The District Court erred in awarding a decree against appellee for maintenance, cure and medical treatment.

8. The District Court erred in entering a decree awarding general and special damages to libelant in any amount.

STATEMENT OF FACTS ON JURISDICTION

Farley was employed by the United States as a seaman aboard the SS "AUGUSTIN DALY" (Tr. 16). The vessel was owned and operated by the United States. W. R. Chamberlin & Co. acted as the shoreside husband for the vessel pursuant to what is commonly known as a "general agency" agreement (Tr. 16).

Farley sustained injuries on April 6, 1952, in the port of Sasebo, Japan, when another seaman fell on him. On March 25, 1954, Farley mailed a notice of claim to W. R. Chamberlin & Co. and to the United States Maritime Administration (Tr. 16; Lib. Ex. 4, Tr. 455).

On April 2, 1954, Farley filed his libel in the District Court against the United States and alleged therein that his claim was deemed administratively disallowed (Tr. 4). The claim has never been expressly accepted or rejected by any administrative agency of the United States (Tr. 16).

It appeared on the face of the libel and subsequent

proceedings clearly disclosed that the libel was filed eight days after Farley had mailed his claim. There was no evidence introduced as to the date when the claim was actually received by W. R. Chamberlin & Co. or by the Maritime Administration.

At all times involved in this case the claim provisions of the Clarification Act of March 24, 1943, Ch. 26, 57 Stat. 45, 50 U.S.C.A. App. 1291 (hereinafter referred to as "Clarification Act") as re-enacted by the Act of June 2, 1951, 65 Stat. 59, 46 U.S.C.A. 1241(a) (hereinafter referred to as "1951 Act") were in full force and effect.

It was and is the position of the United States that it has not consented to be sued in this or similar cases until an administrative claim has either been expressly disallowed or presumptively disallowed by the expiration of 60 days from the date of the filing of the claim.

The United States contended throughout the proceedings below that the District Court did not have jurisdiction and that the libel and pretrial order did not state facts sufficient to constitute a cause of suit against the United States.

These contentions were first presented to the District Court by exceptions to the libel filed by the United States (Tr. 8-10). These exceptions were overruled by the lower court without an opinion (Tr. 10-11). The answer of the United States denied the allegation in the libel that the claim was deemed administratively disallowed and further denied the admiralty and maritime jurisdiction of the court (Tr. 12, 13).

A pretrial order was entered in this case. The lack of jurisdiction was asserted as a defense by the United States and it was listed as a separate issue to be decided by the court (Tr. 23, 24). The lower court did not enter any specific finding with respect to its jurisdiction but merely found as a conclusion of law that it had jurisdiction over the parties and the subject matter of the suit (Tr. 41).

The jurisdictional question and the failure of the libel to state facts sufficient to constitute a cause of suit was reserved for decision on appeal by the statement of points filed by the United States (Tr. 653).

The jurisdiction of this Court over this appeal is conferred by 28 U.S.C.A. 1291 and 28 U.S.C.A. 1294(1).

STATUTES INVOLVED

The Clarification Act of March 24, 1943, Pub. Law 17, Ch. 26, 78th Cong., 57 Stat. 45, 50 U.S.C.A. App. 1291, provides in relevant part as follows:

> "That (a) officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b)(2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clauses (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the

> United States employed as seamen on privately owned and operated American vessels. . . . Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. . . . When used in this subsection, the term 'administratively disallowed' means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration."

The relevant sections of the Clarification Act were re-enacted by Congress in 1951. The Act of June 2, 1951, Pub. Law 45, Ch. 121, 82nd Cong., 65 Stat. 59, 46 U.S.C.A. 1241(a), provides in connection with the "Vessel Operations Revolving Fund" in relevant part as follows:

> "Provided, That the provisions of sections 1(a), 1(c), 3(c) and 4 of Public Law 17, Seventy-Eighth Congress (57 Stat. 45), as amended, shall be applicable in connection with such operations and to seamen employed through general agents as employees of the United States, who may be employed in accordance with customary commercial practices in the maritime industry, notwithstanding the provisions of any law applicable in terms to the employment of persons by the United States:"

ADMINISTRATIVE REGULATIONS INVOLVED

Pursuant to the authority contained in the Clarification Act, the War Shipping Administration issued rules and regulations with respect to suits against the United States and the requirements of administrative claims. General Order 32, April 22, 1943, 8 Fed. Reg. 5414, 46 C.F.R. 304.20-304.29.

General Order 32 provides in relevant part as follows:

> "304.20 *Statutory provisions.* Officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels owned by or under bareboat charter to the War Shipping Administration and operated by an Agent under a General Agency form of Service Agreement, with respect to the claims hereinafter specifically enumerated, are given all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on American flag vessels privately owned and operated. Under such Act, court action (1) may not be instituted to enforce such a claim until it shall have been administratively disallowed, in whole or in part, and (2) must be brought pursuant to the Suits in Admiralty Act."
>
> "304.23 *Court action, condition precedent.* No seaman or his surviving dependent or beneficiary or legal representative having a claim under the provisions of sections 304.21 and 304.22, [refers to injury, maintenance and cure, etc.] shall commence a court action for the enforcement of such claim, unless such claim has been filed by him or on his behalf or by or on behalf of his surviving dependent or beneficiary or legal representative as provided in sections 304.24 and 304.25 and has been adminis-

tratively disallowed by the person or agency with whom it was so filed."

"304.26 *Claim, when presumed administratively disallowed.* If the person or agency with whom the claim is filed, in accordance with the directions contained herein, fails to notify the claimant in writing of a determination upon such claim, within sixty days following the date of filing thereof, the claim shall be presumed to have been administratively disallowed, and the claimant shall be entitled to enforce his claim by court action."

Under date of December 21, 1953, the Federal Maritime Board, Maritime Administration, Department of Commerce revoked General Order 32 of the former War Shipping Administration. 18 Fed. Reg. 8730.

The regulations were replaced on April 7, 1955, by National Shipping Authority Order No. 67, 20 Fed. Reg. 2414, 1955 AMC 1134.

SPECIFICATION OF ERRORS ON JURISDICTION

1. The District Court erred in overruling the exceptions of the United States to the libel.

2. The District Court erred in holding that it had jurisdiction to hear and determine this suit or that it had jurisdiction over the sovereign person of the United States.

3. The District Court erred in holding that the libel or the pretrial order stated facts sufficient to constitute a cause of suit against the United States.

SUMMARY OF ARGUMENT

1. The United States only consented to be sued after a proper exhaustion of administrative remedies. Only eight days expired between the *mailing* of the claim and the filing of the libel and the claim cannot legally or factually be considered administratively disallowed. The court never acquired jurisdiction in this case and there was a complete failure of allegation and proof of facts sufficient to constitute a cause of suit against the United States.

ARGUMENT

I.

The Court Did Not Have Jurisdiction and Farley Failed to Allege or Prove a Cause of Suit.

A decree has been entered in this case against the United States when it clearly appears that Congress has specifically prohibited such suits under the circumstances which are disclosed by this record. The Clarification Act as re-enacted by the 1951 Act requires a seaman-employee to obtain an administrative disallowance of his claim as a necessary condition precedent to the filing of a suit against the United States.

There was a complete failure to satisfy the conditions imposed by Congress and the court never acquired jurisdiction and Farley never obtained a cause of action.

A. Statutes Waiving Sovereign Immunity Are to Be Construed Strictly in Favor of the Government.

The United States can only be sued in accordance with its consent and its liability is limited by whatever may be the bounds of its consent. *North Atlantic & Gulf SS Co. v. United States,* 209 F. (2d) 487, 489 (CA 2, 1954).

The sovereignty of the United States raises a presumption against its suability unless the conditions for suit prescribed by the statutory language are satisfied. *Schnell v. United States,* 166 F. (2d) 479, 481 (CA 2, 1948), cert. denied 334 U.S. 833. Courts are confined to the letter of the statute which expresses or limits the consent to be sued. *Defense Supplies Corp. v. United States Lines Co.,* 148 F. (2d) 311 (CA 2, 1945), cert. denied 326 U.S. 746.

A proper exhaustion of administrative remedies is certainly a valid statutory requirement imposed by Congress. Even formal conditions are considered indispensable. As stated in *Rock Island, Arkansas & Louisiana Railroad Co. v. United States,* 254 U.S. 141, 143 (1920):

> "Men must turn square corners when they deal with the government. If it attaches even purely formal conditions to its consent to be sued, those conditions must be complied with."

It is even necessary to mail an amended libel to the Attorney General where a libel in personam against the United States has been converted into a libel in rem. *Schnell v. United States,* supra. Likewise, the mail-

ing of summons and complaint to the Attorney General as provided in the Federal Rules of Civil Procedure is a mandatory requirement. *Messenger v. United States,* 231 F. (2d) 328 (CA 2, 1956).

The failure to request an investigation as required by statute was considered fatal to a cause of action in *Graham v. Panama Canal Company,* 139 F. Supp. 271 (D.C., C.Z., 1955). An appeal to the Commissioner of Internal Revenue prior to an action against the United States was held to be a necessary prerequisite in *Rock Island, Arkansas & Louisiana Railroad Co. v. United States,* supra.

The courts cannot interpret these statutes so as to dispense with statutory conditions. Exceptions cannot be engrafted into legislation even in the so-called hardship cases. *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380 (1947); *Graham v. Panama Canal Company,* supra.

As stated in *Federal Crop Ins. Corp. v. Merrill,* supra.

> "It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures." (332 U.S. at 383)

This is equally true in suits by seaman-employees against the United States. In *McMahon v. United States,* 342 U.S. 25 (1951), the Supreme Court followed a rule of strict construction even after pointing out that legislation for the benefit of seamen should be construed liberally in their favor.

The plain language of the Clarification Act as re-enacted by the 1951 Act required an administrative disallowance prior to the filing of suit against the United States. If there is any necessity to construe this legislation, it must be construed strictly in favor of the United States and against the libelant.

B. Claim Must Be Filed and Disallowed Before Seaman Can Sue United States.

The Clarification Act enlarged the rights of seamen and provided for a uniform and definite method of enforcing those rights against the United States. The statute specifically provided that "Any claim referred to in clause (2) [included claims for injuries and maintenance and cure] or (3) hereof shall, *if administratively disallowed* in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act. . . ." (Emphasis added.)

The statute further defined the term "administratively disallowed" as a denial of a written claim in accordance with rules or regulations prescribed by the War Shipping Administration.

Pursuant to the statute, the War Shipping Administration issued extensive rules and regulations which required that a claim be filed and that it be administratively disallowed before the commencement of an action against the United States. Under these regulations, it was absolutely necessary for the claim to be either expressly disallowed or, in the alternative, presumptively disallowed by the expiration of 60 days from the date of the filing of the claim. General Order 32 (Br. 7-8).

The statute and the regulations which were enacted pursuant thereto have been repeatedly construed by the federal courts. Suits which were prematurely filed were uniformly dismissed on the grounds that an action could not be commenced against the United States until an administrative claim had been filed and administratively disallowed. *Fox v. Alcoa SS Co.,* 143 F. (2d) 667 (CA 5, 1944), cert. denied 323 U.S. 788; *Rodinciuc v. United States,* 175 F. (2d) 479 (CA 3, 1949), cert. denied 338 U.S. 895; *Gregory v. United States,* 187 F. (2d) 101 (CA 2, 1951); *Militano v. United States,* 156 F. (2d) 599 (CA 2, 1946); *Kemp v. United States,* 1953 AMC 192 (D.C., E.D. Pa. 1952); *Riggens v. United States,* 87 F. Supp. 128 (N.D. Ohio E.D. 1949).

In *Fox v. Alcoa SS Co.,* supra, the court held that the United States could not have been sued at all except for the provisions of the Clarification Act and that the privilege of suing was given only after administrative disallowance of a written claim. The court further stated that this accords with the general policy of the United States.

The purpose of the statute was further construed in *Rodinciuc v. United States,* supra:

> "There is no doubt that Congress intended, by the Clarification Act, to grant a broad right of recovery against the United States. The purpose is also clearly expressed, however, to channel the seaman's claim first to the Administrator and then, from his adverse action, to the courts. The seaman has two years from the time of his injury to start suit. Within that two-year period he must file a claim with the Administrator, and if it is disallowed, the seaman may sue." (175 F. (2d) at 481)

Under the terms of the Clarification Act, Farley's right of action did not arise unless and until he exhausted his administrative remedy. *McMahon v. United States,* 186 F. (2d) 227 (CA 3, 1950), affirmed 342 U.S. 25 (1951). This is more than a technical requirement of an administrative regulation. It involves the proper fulfillment of a statutory condition to bringing an action against the United States. *Danstrup v. The Richmond P. Hobson,* 112 F. Supp. 851 (E.D., N.Y. 1953).

This was certainly the view of this court when it decided *Thurston v. United States,* 179 F. (2d) 514 (CA 9, 1950). This court held "the 'claim' does not mature into the 'cause of action' until its disallowance." (179 F. (2d) at 516)

The War Shipping Administration was terminated as of September 1, 1946, and all functions and powers of the administration were transferred to the United States Maritime Commission. Section 202 of the Act of July 8, 1946, Ch. 543, Title II, 60 Stat. 501. Thereafter there were other reorganizations and transfers.

Danstrup v. The Richmond P. Hobson, supra, discusses the history of the agencies entrusted with the duty of handling seamen's claims against the United States. The court in that case held that the history of these agencies showed a uniform attempt to conform to the express purpose of the Clarification Act.

If there was any doubt as to the length of time that the provisions of the Clarification Act survived the demise of the War Shipping Administration, this was completely removed by the passage of the 1951 Act. This

act specifically incorporated the provisions of the Clarification Act which required an administrative disallowance.

The passage of the 1951 Act eliminated any problems or confusion with respect to seamen's claims which may have been presented by cases such as *Handley v. United States,* 127 F. Supp. 539 (S.D. N.Y. 1954), and *Burton v. United States,* 109 F. Supp. 139 (S.D. N.Y. 1952).

Both of these cases failed to interpret or give proper effect to the 1951 Act. In addition, the Burton case applied only to seamen whose rights were extended by the amendment of 46 U.S.C.A. 745 which granted an extension of the statute of limitations to December 13, 1951.

Recent decisions have properly held that the court has no jurisdiction in the absence of allegation and proof that a claim has been administratively disallowed. *Thomas v. United States,* 127 F. Supp. 48 (E.D. Pa. 1954); *Sofie v. United States,* 1956 AMC 1459 (D.C. W.D. Wash. N.D. 1956); *Kinman v. United States,* 139 F. Supp. 925 (N.D. Cal. S.D. 1956).

Thomas v. United States, supra, was quite similar to the present case in that the claim was filed on February 12, 1954, and the suit was filed on February 23, 1954. The court gave proper effect to the 1951 Act and held that the suit could not be maintained because there had been no actual or presumptive disallowance of the claim.

The 1951 Act was in force during 1952. Farley sustained an injury in 1952 and filed his libel in 1954.

Regardless of any possible confusion as to the continuing effect of the Clarification Act, this 1951 Act specifically re-enacted into law the requirement of administrative disallowance.

This was a condition solemnly imposed by Congress and Farley was prohibited from bringing suit until he had obtained an administrative disallowance of his claim.

C. 60 Days Must Expire Before Claim Deemed Presumptively Disallowed.

The libel, which was filed on April 2, 1954, alleged that a claim was mailed on March 25, 1954, and that it had not been accepted or rejected and was deemed administratively disallowed. Only eight days expired between the mailing of the claim and the filing of this suit.

Farley made no attempt whatsoever to prove his allegation that the claim had been administratively disallowed. The allegations of the libel and the evidence clearly show that there was, in fact, no presumptive disallowance of this claim.

The Clarification Act as re-enacted by the 1951 Act provided that the term "administratively disallowed" means a denial of a written claim in accordance with rules or regulations prescribed by the War Shipping Administration.

The War Shipping Administration provided for actual allowance and disallowance and further provided that if the claimant was not notified in writing of a determination of his claim within 60 days from the date

of the filing of the claim that it would be presumed to have been administratively disallowed. 46 C.F.R. 304.26 (Br. 8).

The regulations of the War Shipping Administration, including the provision providing for presumptive disallowance, were continued in effect from time to time by the various succeeding administrative agencies. See *Danstrup v. The Richmond P. Hobson,* 112 F. Supp. 851 (E.D. N.Y. 1953).

On December 21, 1953, which was after the passage of the 1951 Act, the Maritime Administration revoked General Order 32 of the former War Shipping Administration. 18 Fed. Reg. 8730. These regulations were replaced on April 7, 1955, by NSA Order No. 67, 20 Fed. Reg. 2414, 1955 AMC 1134.

It is clear that the revocation of General Order 32 by the Martime Administration in 1953 did not dispense with the necessity of administrative disallowance of a claim. Congress required such disallowance in the 1951 Act and the Maritime Administration certainly could not repeal or revoke the requirements of the statute.

The 60-day rule of presumptive disallowance had been in continuous effect for more than eight years prior to the passage of the 1951 Act. Numerous decisions of the courts of the United States had interpreted the regulations of the War Shipping Administration at the time when Congress considered and passed this Act.

The rule seems to be well-established that the reenactment, in the same or substantially the same terms,

of a statute which has received a settled judicial construction amounts to a legislative adoption of such construction. *Heald v. District of Columbia,* 254 U.S. 20 (1920); *Annotation,* 65 L. Ed. 106.

The regulations were issued in accordance with the directions contained in the Clarification Act. For all practical purposes, these regulations became a part of the statute. Congress re-enacted the statute without any amendment or change and it must be assumed that the regulations were approved and adopted as a part of the re-enacting legislation.

It has long been held that the re-enactment by Congress without change of a statute which has previously received continued executive construction is the adoption by Congress of such construction. *United States v. Cerecedo Hermanos y Compania,* 209 U.S. 337 (1908); *Hassett v. Welch,* 303 U.S. 303 (1938). In addition, legislative approval of existing regulations by re-enactment of the statutory provision to which they appertain gives such regulations the force of law. *Helvering v. R. J. Reynolds Tobacco Co.,* 306 U.S. 110 (1939); *Helvering v. Winmill,* 305 U.S. 79 (1938); *Boehm v. Commissioner of Internal Revenue,* 326 U.S. 287 (1945).

Moreover, when Congress re-enacted that portion of the Clarification Act which provided "When used in this subsection, the term 'administratively disallowed' means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration.", such regulations were

actually in existence and were expressly enacted into law as an integral part of the 1951 Act.

The 1951 Act can hardly be interpreted otherwise. Congress certainly required administrative disallowance and if there was no available procedure for presumptive disallowance between December 21, 1953 and April 7, 1955, then seamen were necessarily obligated to obtain an express disallowance before they could sue the United States.

The regulation provided for presumptive disallowance after the expiration of 60 days and it would be unreasonable to assume that Congress intended that any other length of time should be applied. This is a proper matter for regulation and it is not an unreasonable length of time. *Fox v. Alcoa SS Co.,* 143 F. (2d) 667 (CA 5, 1944), cert. denied 323 U.S. 788. Sixty days is the time allowed by Rule 12(a) of the Civil Rules of Procedure for the United States to file an answer and it is also the length of time allowed the government for appeal. 28 U.S.C.A. 2107.

Congress could hardly have intended that the alternative method of presumptive disallowance should be decided by what would constitute a reasonable length of time under the facts and circumstances which may be involved in each case. Such a hit-or-miss procedure is not in the interest of orderly administration of claims or litigation against the United States.

Even if it is necessary to determine what constitutes a reasonable length of time for presumptive administrative disallowance, it is clear in this case that a wholly

inadequate length of time expired between the filing of the claim and the filing of the libel. It would be fantastic to assume that eight days, including time required for transmission by mail, was a reasonable length of time for the government to investigate and consider the facts and circumstances which were involved in this case.

There has been a uniform policy by Congress since 1943 to have claims channeled and administered through the appropriate administrative agency before allowing suit against the government. This is a mandatory statutory requirement and it cannot be waived.

There is no evidence in this record which would indicate any reason or excuse for the failure of Farley to file a timely claim and to obtain a proper administrative disallowance. The court did not have any jurisdiction and the allegations and evidence fail to prove facts sufficient to constitute any cause of action against the United States.

STATEMENT OF FACTS ON THE MERITS

On the night of April 5-6, 1952, the steamship "Augustin Daly" was at anchor in the harbor of Sasebo, Japan, having arrived there on April 2nd (Tr. 109). The vessel was equipped with a pilot ladder and an accommodation ladder, both in good condition (Tr. 564-5). Because of the deep draft, heavy load, tenderness of the ship and the discharge of long piling from the deck into rafts in the water, the accommodation ladder was not

used and the master and chief officer determined to use a pilot ladder (Tr. 515,558). The pilot ladder besides being used by the ship's crew was used by longshoremen, military, naval officials and others concerned with the cargo—by more than 75 men each day (Tr. 516). The vessel was lying in smooth water in a protected harbor.

Farley was at the time of the accident 58 years of age. He had gone to sea for more than 30 years and had held a second assistant engineer's license, issued by the United States, since 1928. He was at that time suffering no physical disability and was in full possession of his sight and hearing. On April 5th at about 6:00 P. M., Farley, together with other members of the crew, descended the pilot ladder from the boat deck or main deck of the vessel in the area of the midships house to a launch provided by the United States and proceeded ashore. Farley testified that while ashore he had probably 3 beers, made some purchases, saw other members of the crew and particularly the assistant cook, Malcolm Edward Potts, consuming intoxicating liquor, and shortly before midnight Farley went to the dock for return to the ship via the launch. Aside from the operator of the launch there were 10 to 15 men on board. The launch was variously estimated at from 25 to 40 feet long with a beam from 6 or 7 to 10 or 12 feet. A portion of the after part of the launch was covered and was provided with seats for the men. The launch reached the ship shortly before or after 1:00 A.M. on June 6th and was made fast to the side of the "Augustin Daly." The pilot ladder was adequately lighted by deck lights on the vessel and at least one flood light which directed its beam

on the ladder. Farley had been seated in the stern of the launch. He walked forward a distance estimated by him as about 10 feet and stood 4 or 5 feet from the foot of the ladder. He testified that he stood there talking to other members of the crew until his injury without looking to see who was ascending the pilot ladder or the manner of the ascent. He testified that the light was such that he could have seen a man ascending the ladder and whether the person was encumbered by packages had he looked (Tr. 400).

The pilot ladder was of the usual type with oval side pieces into which were fitted 2 wooden rungs for each step with ropes running around the edges of the side pieces and seized or fastened at the points where the ends of the side pieces came together. Because of the shape of the side pieces which rested against the side of the vessel, there was a handhold on each side where the ropes were seized. No attempt was made by Farley to show that the pilot ladder was improper in construction or defective in any way. No part of the ladder broke or carried away. No charge was made that the lighting conditions were not adequate.

The assistant cook Potts climbed the pilot ladder carrying a bottle of whiskey under his left arm and holding another bottle by the neck with his right hand. He was 28 years old, 5 feet 9 inches tall, and weighed about 160 pounds. He had engaged in athletics in school and after leaving school. The ladder was fastened to the pipe rail on the boat deck and led past the main deck. Potts fell from the ladder at the main deck level and could not

remember whether he had a leg over the rail or was standing on it. He did not know why he fell. He had been drinking intoxicating liquor ashore and testified that he was not absolutely sober. Potts apparently sustained no injuries in the fall, but he landed on Farley who was standing near the foot of the ladder.

Various members of the crew brought packages with them on the launch. After the accident, packages were hauled up with a heaving line (Tr. 632-3), the usual practice when the pilot ladder was used.

The vessel's articles (Res. Ex. 9) prohibited the bringing of grog (intoxicating liquor) aboard the vessel. All witnesses agreed that it was hazardous for a man to climb a pilot ladder with hands so encumbered. Robinson, business agent for the Marine Engineers at Portland, testified that it was a "damned dangerous way" to climb a ladder (Tr. 477). Robinson, who was qualified by Farley as an expert, further testified that a ship is a place where a man is expected to keep his eyes open (Tr. 481), that the second assistant engineer had the right to stop a crew member from doing a dangerous act (Tr. 493), that it is not safe to stand under a ladder while a man is ascending with both hands free (Tr. 494), and it is not safe to stand within 5 feet of the foot of the ladder (Tr. 495). The same witness testified (Tr. 496):

> "I will say, regardless of what that ladder was there, we will say they were acting in accordance with the law, it doesn't state it must be one kind of a ladder or another, and they both have been used for years and years and years and hundreds or thousands of men have went up and down them, so I wouldn't attempt to say which is the safer or isn't the safer,

it is up to the Master of the ship and the company to decide what type of a ladder to put there for the men to come up and down."

With the exception of Farley's witness McRae, no witness testified that a pilot ladder was not a reasonably safe appliance for boarding and leaving a ship (Tr. 141). There was testimony of Captains Larsen and Hazelwood, shipmasters of many years' experience, that a pilot ladder is a proper and safe appliance (Tr. 333, 312).

SUMMARY OF ARGUMENT

A vessel is not negligent in furnishing a pilot ladder in good condition. *The Manitoba,* 99 Fed. 780; *Field v. Waterman S.S. Corp.,* 140 F. (2d) 849; *Biles v. U.S.,* 1949 A.M.C. 875; *Van Dartel v. U.S.,* 1950 A.M.C. 572.

In an action under the Jones Act, proof of negligence on the part of the United States is essential to Farley's recovery. *Johnson v. U.S.A.,* 333 U.S. 46; *Atlantic Coast Line Rd. Co. v. Anderson,* 221 F. (2d) 548; *Ford v. United Fruit Co. and U.S.A.,* 171 F. (2d) 641; *Witt v. U.S.A.,* 82 Fed. Supp. 696; *Nunez v. U.S.A.,* 123 Fed. Supp. 256; *Seville v. U.S.A.,* 163 F. (2) 296.

The proximate cause of Farley's injuries was his negligence in standing at the foot of the pilot ladder. *Larsson v. Coastwise (Pacific Far East) Line,* 181 F. (2d) 6, cert. den., 340 U.S. 833; *Ford v. United Fruit Co. and U.S.A.,* 171 F. (2d) 641; *Seville v. U.S.A.* 163 F. (2d) 296; *Atlantic Coast Line Rd. Co. v. Anderson,* 221 F. (2d) 548.

Farley was the only licensed officer present at the

time of the accident. It was his duty to warn Potts against the danger of ascending the ladder with his hands encumbered, particularly after observing Potts drinking intoxicating liquor ashore. Farley's breach of duty bars any recovery. *Jensen v. U.S.*, 184 F. (2d) 72; *Walker v. Lykes Bros. S.S. Co.*, 193 F. (2d) 772; *Dixon v. U.S.*, 219 F. (2d) 10; *Mason v. Lynch Brothers Co.*, 131 Fed. Supp. 255; *Battice v. U.S.*, 79 Fed. Supp. 932; *Mullen v. Fitzsimmons & Connell Dredge & Tug Co.*, 191 F. (2d) 82, cert. den., 342 U.S. 888; *Mullen v. Fitzsimmons & Connell Dredge & Tug Co.*, 199 F. (2d) 557, cert. den., 344 U.S. 933.

Farley walked from a safe place to a place of danger at the foot of the pilot ladder, while Potts was ascending the ladder in a negligent manner. *Larsson v. Coastwise (Pacific Far East) Line*, 181 F. (2d) 6, cert. den., 340 U.S. 833; *Ford v. United Fruit Co. and U.S.A.*, 171 F. (2d) 641; *Seville v. U.S.A.*, 163 F. (2d) 296; *Atlantic Coast Line Rd. Co. v. Anderson*, 221 F. (2d) 548. Negligence is determined in the light of all facts he knew or ought, in the exercise of reasonable care, to have known. *Atlantic Coast Line Rd. v. Anderson*, 221 F. (2d) 548; *Rocco v. Leheigh Valley Rd. Co.*, 288 U.S. 275, 77 L. Ed. 743; *Isaacson v. Jones*, 216 F. (2d) 599; *Saindon et al, v. Lucero, Adm.*, 187 F. (2d) 345; *DeHoney v. Harding*, 300 Fed. 696; *Cleveland-Cliffs Iron Co. v. Metzner*, 150 F. (2d) 206; *U.S. Gypsum Co., Inc., v. Balfanz*, 193 F. (2d) 1; *Witt v. U.S.A.*, 82 Fed. Supp. 696. There is no duty to warn of known or obvious dangers and there is no negligence in failing to do so. *Atlantic Coast Rd. Co. v. Anderson*, 221 F. (2d) 548. The vessel was not unsea-

worthy because a pilot ladder, sound and properly constructed, was used. *Cookingham v. U.S.A.,* 194 F. (2d) 213. There is neither authority nor testimony in the record indicating that Potts was not equal in ability to any of the other men in climbing a pilot ladder.

ARGUMENT

In an action under the Jones Act, a recovery can be based only on proof of negligence on the part of the shipowner. In *Johnson v. U.S.A.,* supra, Mr. Justice Douglas said:

> "The Jones Act makes applicable to these suits the standard of liability of the Federal Employers Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U.S.C. 51."

And in a dissenting opinion in the last cited case, Mr. Justice Frankfurter said:

> "But so long as Congress sees fit to have liability for injuries by railroad employees and seamen based solely on proof of fault, it is not for this court to torture and twist the law of negligence so as to make it in result a law not of liability for fault, but a law of liability for injuries."

In *Atlantic Coast Line Rd. Co. v. Anderson,* supra, the Court of Appeals for the Fifth Circuit said:

> "It is still the law that in a case of this kind proof of negligence on the part of defendant is essential * * *. The basis of his liability is his negligence, not the fact that injuries occur. Ellis v. Union Pacific Rd. Co., 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572."

Negligence of Farley Is Sole Cause

The evidence clearly established that Farley's injuries were caused in whole or in part by his negligence in standing within 4 or 5 feet of the foot of the ladder while a member of the crew, with hands encumbered, was ascending the ladder. This court has in two cases in which the facts were strikingly similar held that an injured seaman cannot recover from the vessel owner.

In *Larsson v. Coastwise (Pacific Far East) Line,* supra, a merchant seaman filed a libel in personam, as in the case at bar, seeking damages from the United States and Coastwise Line for injuries sustained while a member of the crew. Libelant asked for damages, maintenance and cure. He was employed as an oiler and was fully familiar with the operation of the vessel's steam winches. While oiling the winch, he sustained injuries when the winch was negligently thrown into operation by Chinese stevedores. The winch was equipped with a shut-off valve with which libelant was familiar, but before attempting to oil the winch libelant neglected to shut off the steam. This court said, 181 F. (2d), at page 9:

> "* * * being a man of experience must have known that by its use, his job of oiling the winch would be rendered absolutely safe."

This court added:

> "There is no question that a shipowner is obliged to furnish a seaman a safe place to work and that this duty is non-delegable * * *. The shipowner's responsibility to furnish a safe place continues through any hazard created by stevedores in loading the cargo and engaged by the owners for that purpose."

The District Court dismissed the libel for damages, but allowed maintenance and cure and this court, in affirming the District Court, said (181 F. (2d) at page 9):

> "From a review of the record, it is our conclusion that the findings of the District Court that appellee owner was free from negligence are sustained by the evidence. Moreover, there was no evidence to sustain the claim that the ship was unseaworthy or that there was failure to supply a safe place for appellant to work so as to place any liability in respect of the winch operation upon the shipowner."

It would be difficult to find a case more fully parallel to the case at bar than that last cited. Assuming in the case at bar that Potts was guilty of negligence in attempting to climb the ladder encumbered as he was and in falling from the ladder, his negligence is comparable to that of the stevedores who negligently threw the winch in operation while Larsson was oiling it. Larsson made his place of work unsafe by failing to shut off the steam. Farley made his place of work unsafe by standing where, not only the government's witnesses but several of his own witnesses testified that it was dangerous to stand. Farley had proceeded from a safe place at the stern of the launch 10 feet in the direction of the pilot ladder to a point within 4 or 5 feet from the ladder. Farley's expert Robinson testified (Tr. 495):

> "Well, if he is 10 feet away from the ladder normally he has protected himself."

Farley by his own testimony showed that he could have remained 15 feet from the foot of the ladder.

In *Ford v. United Fruit and U.S.A.*, supra, a member of the crew of a merchant vessel sat on the ship's rail

facing outward watching the loading operations. He was accidentally bumped by one of two seamen engaged in innocent horseplay in the passageway behind the railing and fell to the dock below. He brought his action under the Jones Act to recover damages for negligence and also claimed additional wages, maintenance and cure. The District Court denied a recovery on the ground that libelant's injuries were solely due to his placing himself in a dangerous and precarious position on the ship's rail which was likely to and did cause him to sustain personal injuries. The court found that there was no negligence or unseaworthiness on the part of respondents and this court sustained the District Court's dismissal of the libel.

In *Atlantic Coast Line v. Anderson,* supra, plaintiff's intestate was crushed between a chain and a rail car and was killed. Plaintiff asserted that her intestate's death was due to negligence of the engineer. After discussing the principles upon which liability under the Employers Liability Act is founded, the court said (221 F. (2d), at page 553):

> "It was not a situation where facts were known to the engineer which were not known to Anderson. It was not a situation where Futch, not Anderson, was directing the operations. It took only a few steps for Anderson to place himself in a position of safety around the southwest corner of the car, but he continued his attempts to disconnect the chain and in that brief moment he was caught. How could Futch have known or believed that Anderson would not take himself out of harm's way? How could there be a legal duty to warn Anderson when the situation was perfectly obvious to Anderson and the fatality occurred in a few seconds? The law is

well settled that there is no duty to warn of known or obvious dangers and no negligence, therefore, in failing to do so. 65 C.J.S., Negligence, Sec. 89, Notice or Warning of Known or Obvious Dangers, page 599; 56 C.J.S., Master and Servant, Sec. 296, page 1057; Foreman v. Texas & N.O.R. Co., 5 Cir., 205 F. 2d 79.

"We realize that in a Federal Employers' Liability case assumed risk is not a defense and that contributory negligence goes only to diminution of damages. This is not a case of contributory negligence or assumed risk but of sole negligence. In placing and keeping himself in a position of danger between the end of the box car and the chain attached to the front of the locomotive, Anderson was guilty of extreme negligence. While this would only diminish his damages if the defendant was also guilty of negligence, proof that it was is wholly lacking, and Anderson's negligence was, as matter of law, the sole proximate cause of the accident." Citing cases.

A judgment upon a verdict of the jury was reversed by the Court of Appeals.

Farley was a man of 30 years' experience on shipboard. He had been a licensed engineer since 1928. His negligence must be determined in the light of all the facts he knew or ought, in the exercise of reasonable care, to have known. *Rocco v. Leheigh Valley Rd. Co.,* supra.

In *Isaacson v. Jones,* supra decided by this court in 1954, libelant, a passenger on a speedboat, was thrown into the water while sitting on the gunwale. The operator who knew he was in that precarious position, executed a sharp turn without warning. Libelant, who was experienced in water skiing, was found negligent for as-

suming a dangerous position. The court said (216 F. (2d) at page 601):

> "It seems inescapable that a man of his age and experience knew or should have known that sitting on the gunwale under those circumstances was dangerous in the extreme. The above recited facts in our opinion established, without question, that libelant did not exercise the ordinary care for his own safety which his knowledge and experience required; hence he was contributorily negligent."

In *Cleveland-Cliffs Line Co. v. Metzner,* supra, the court said (150 F. (2d) at page 209):

> "* * * If one voluntarily places himself in or remains in a position which he knows, or by the exercise of ordinary care should know, is dangerous, he cannot recover for resulting injury unless such injury is due to the negligence of the other party after the peril of the party injured is discovered. *Ordinary prudence requires every person to use his faculties of hearing and sight for his own protection and to avoid places of danger* * * *." (Emphasis added.)

In *Witt v. U.S.A.,* supra, libelant was injured by striking his hip against an unhooked door through which ship's stores were being moved. The court said (82 Fed. Supp. at 698):

> "This brings us to libelant Witt who looked through the door but did not see how far it was open, which is another way of saying that he did not use his eyes. It is not unreasonable to require men to do that who have them to use. In other words, the negligence was his, and his alone, not that of the ship, namely, his fellow servant."

Breach of Duty by Farley Bars Recovery

Farley can hardly contend that he was under no duty to prevent injury to a crew member aboard the vessel since the duty was imposed upon him by statute. 18 U.S.C.A. 2196 provides as follows:

> "Whoever, being a master, *officer,* radio operator, seaman, apprentice or other person employed on any merchant vessel, by willful breach of duty, or by reason of drunkenness, does any act tending to the immediate loss or destruction of, or serious damage to, such vessel, or tending immediately to endanger the life or limb of any person belonging to or on board of such vessel; or, by willful breach of duty or *by neglect of duty* or by reason of drunkenness, refuses or *omits to do any lawful act proper and requisite to be done by him* for preserving such vessel from immediate loss, destruction, or serious damage, or *for preserving any person belonging to or on board of such ship from immediate danger to life or limb, shall be imprisoned not more than one year.*" (Emphasis added.)

Potts had been drinking intoxicating liquor shortly before the accident. Farley knew this. Had Farley looked he would have seen that Potts was climbing the ladder in an extremely negligent manner with one bottle of whiskey under one arm and the top or another bottle clutched in the other hand. Farley says he did not see this, but could have seen it had he looked (Tr. 398).

Had Potts been injured as the result of his negligence in climbing the ladder while the second assistant engineer stood by and said nothing, Potts might well have established fault on the part of the vessel owner because of Farley's failure to warn him. Since there is no duty, however, to warn against obvious dangers, the shipowner

might have escaped liability for injuries to Potts, but the statute required Farley "to do what was proper and requisite to be done for preserving any person belonging to or on board of such ship from immediate danger to life or limb."

Farley's expert Robinson, business agent for the Marine Engineers Union, testified as follows:

> "Now, this fellow you are speaking of, Mr. Farley, isn't the aggressive type I will say, never was. He never butted in any disputes with the crew and he just was sort of a happy go lucky guy and had very little trouble.
>
> "There is many of them that tend to give orders to everyone and butt in and boisterous and they would probably have done different than Farley did, but he is not the aggressive type and he just live and let live, I presume is what that was."

Robinson's analysis of Farley's character throws light upon both what Farley did at the time of the accident and testfied to in this proceeding. Farley did not want to see or hear what was going on. In and about ships, where all of the witnesses agree, one must be alert to avoid injury, Farley closes his eyes to the dangers to which he, himself, is exposed and in the same manner attempts to avoid his obligation to warn Potts against his negligent conduct. He was the only licensed officer on the launch. Aside from the statutory duty imposed upon officers of vessels, there was ample evidence upon the trial to support a finding that all of the officers have a duty to prevent accidents and generally to see to the safety of the crew.

In *Jensen v. U.S.*, 184 F. (2d) 72, the vessel was held

responsible for the failure of the officers to protect a member of the crew from injury. The vessel was at anchor in the Philippine Islands and a fight started between two crew members while about thirty members of the crew and two ship's officers were returning to the vessel in the ship's launch. The ship's carpenter was carrying a bottle of whiskey, was drunk and quarrelsome and picked a quarrel with an oiler. He was restrained from attacking the oiler in the launch and one of the officers told the carpenter to wait until he got back to the ship. When they arrived at the ship the officers and crew members gathered around one of the hatches to watch the fight and libelant was injured as he attempted to take a knife from the carpenter. The court said that no officer gave any order to the carpenter or attempted to restrain him in any way and that under the circumstances they had no difficulty in concurring with the District Court's finding of liability. The court (Third Circuit) stated that the master and ship's officers were under a duty to see to the safety of the crew and that they failed in that duty.

If it be assumed that Farley was injured by the negligent acts of Potts and it was Farley's duty, arising out of his employment as a ship's officer, to warn Potts and to restrain him from ascending the ladder while encumbered as he was, Farley's injuries were caused by his failure to perform his obligation and duty. The leading case on the duties of masters, and probably other officers, is *Walker v. Lykes Bros. S.S. Co.,* supra. The opinion was written by Judge Learned Hand. A master had brought an action against a shipowner for injuries that

he sustained when he was struck by a steel filing cabinet drawer. The master testified that six of the eight catches were out of order and did not hold the drawers when the ship rolled. The trial court refused to direct a verdict for the defendant and gave certain instruction concerning negligence and contributory negligence. The Court of Appeals stated that it was customary to speak of contributory negligence as a failure by the injured party to discharge a duty owed toward the wrongdoer. The court stated that it was important to distinguish between such a duty which the law imposes upon the injured person and a duty which the injured person has consciously assumed as a term of his employment. The court held that the first type results in no more than reducing the amount of an employee's recovery, but the second type is a bar to any recovery. The court said that if the plaintiff failed to repair the catches although he was able to do so, his failure was not only contributory negligence in the first sense but also a breach of his duty to the defendant which barred his recovery absolutely. In reversing the judgment and ordering a new trial, the court stated (193 F. (2d) at 774):

> "The theory apparently is that a momentary inattention to one's own safety—the kind of thing of which we are all guilty every day—should not be treated as so serious a fault as a breach of a duty assumed by the employee for the protection of others, although incidentally it is for his own benefit too."

The *Walker* case was further explained in *Dixon v. U.S.*, supra. In that case the chief mate brought an action to recover for injuries sustained as the result of a fall when the top rungs of a ladder gave way. At the time

of the accident the chief mate was inspecting the ladder after defective bottom rungs had been repaired by a contractor. It thus appeared that the chief mate was actually engaged in performing the duty which he owed to the vessel. The court referred to the Walker case and stated that it was not applicable as Dixon was not guilty of any breach of duty toward his employer. The court said that the Walker case and one other cited case were in no way inconsistent with the rule that assumption of risk is not a defense or comparable to the situation before the court; that those cases were only incidents of the firmly established rule that the employee cannot recover against his employer for injuries occasioned by his own neglect of some independent duty arising out of his employer-employee relationship; and that the results in those cases turn not upon any question of proximate cause, assumption of risk or contributory negligence, but rather upon the employer's independent right to recover against the employee for the non-performance of a duty resulting in damage to the employer which in effect off-sets the employee's right to recover against the employer for failure to provide a safe place to work.

The Walker case was followed in *Mason v. Lynch Brothers Company,* 131 Fed. Supp. 255, which involved an action by the master of a tug to recover for injuries caused by a fall on a slippery deck. Although not definitely stated, the same principle was followed in *Battice v. U.S.,* supra. In the Battice case libelant was a chief steward in charge of the ice box. While taking inventory, a piece of loose ice fell and struck him. The court stated that libelant was responsible for the proper stowage of

the ice box; that his negligence was the proximate cause of the accident; that even had it been proven that a messman had violated his instructions, the fact would still remain that it was his duty to see to it that the ice box was at all times a safeplace in which to work. The court further held that if relevant it would find that the conduct of libelant in failing to take precautions for his own safety when he saw the condition of the box (as he should have) was contributory negligence as a matter of law.

In *Mullen v. Fitzsimmons & Connell Dredge & Dock Co.,* supra, a seaman sought to recover damages for negligence and for maintenance and cure. Plaintiff was an able-bodied seaman with 33 years' experience on the Great Lakes and was employed by defendant as a deckhand on a tug. Plaintiff's duties consisted of handling mooring lines, helping the fireman in dumping ashes from the boiler room, and in closing hatches when necessary to keep the tug from taking water in rough weather. On the day of the accident, the tug had proceeded out of a harbor into the lake. After passing the breakwater the tug ran into a heavy sea. A wave followed plaintiff as he stepped through the galley door and closed the door on his right hand. The court held that the injury was caused solely by plaintiff's failure to perform his known duty as a deckhand; that he did not shut the galley door when he saw that the tug was going out into the lake in a heavy sea, and that his injuries resulted from his own negligence.

The last cited case involved also a question as to maintenance and cure and the court remanded this part

of the case to a court of admiralty. Upon appeal (199 F. (2d) 557,, cert. den., 344 U.S. 933) the court held that plaintiff was not entitled to maintenance and cure because his injury resulted from his own wilful disobedience of order and failure to perform his known duties. The principle has been applied in cases involving the master, steward, seamen and deckhands. The rule should certainly be applicable to a licensed officer.

Ship Not Negligent for Failure to Warn Potts

Farley contended that the ship had a duty to warn Potts against the danger of falling from a pilot ladder while climbing with his hands encumbered. The United States had to act through the master, officers or members of the crew. Farley, a licensed officer, being on the ground, disclaims the duty to warn Potts, but asserts that the shipowner had such an obligation.

There is, of course, no duty to warn against obvious dangers. Had Potts been warned that there was danger of falling if he had only one hand or the partial use of two hands while climbing the ladder, he could not have known any more than his common sense told him. Farley might just as well contend that the United States should have warned him against standing at the foot of the pilot ladder, particularly while a man is climbing the ladder in a negligent fashion. Farley asserts that Potts was negligent, but denies that he, himself, was negligent, although the situations are virtually analogous. Had Farley used his senses he would have known without receiving any warning that he was in a place of danger. It was Farley's duty to stop Potts in his negligent conduct. It

was Farley's duty in the exercise of ordinary care to stand clear of the ladder when anyone was climbing or descending. He not only violated his duty toward the United States in not preventing injury to Potts, but he disregarded his duty to exercise reasonable care for his own safety.

Ship Not Unseaworthy

Farley goes one step farther in charging the vessel with unseaworthiness because of Potts' alleged inexperience. He contends that Potts should have received training and instruction in the climbing of a pilot ladder. But according to the evidence, with little dispute, both Farley with 30 years' experience and Potts with two months' experience were guilty of negligence, even gross negligence. Since Farley did not stand clear of the ladder it may be assumed that he at no time received instruction to stand clear of ladders. Nothing that the shipowner could have told or shown either Potts or Farley regarding their negligence and violation of duty could have added to the knowledge that they obtained from observation of the pilot ladder.

If it be assumed that the vessel was negligent because of Potts' attempt to climb the ladder or that the vessel was unseaworthy because of employing him, the question still remains as to what was the proximate cause of Farley's injuries. If Farley had been required to stand at the foot of the ladder while Potts was ascending, his injuries might in whole or in part be regarded as having resulted from the negligence or unseaworthiness of the vessel. In *Johnson v. U.S.*, supra, libelant was

required to stand under another crewman who was holding a heavy block. The crewman dropped the block on libelant's head. Obviously libelant's injuries were proximately caused by the crewman's negligence. Libelant was in his proper place of work and it was rendered unsafe by the negligence of his fellow-employee.

If we assume that negligence of Potts contributed to produce Farley's injuries, the latter's gross negligence and callous indifference for his own safety and that of Potts clearly contributed heavily toward his injuries. In this situation the damages which he suffered should be diminished in proporton to the negligence for which the United States is liable and the contributory negligence for which Farley is chargeable.

AMOUNT OF DAMAGES

Farley, while sustaining serious injuries, has made a very substantial recovery. He was married and living with his wife. He did not produce her nor any neighbors or friends who might have known the extent of his ability to work. In September, 1953, he worked one night as a relief engineer. From that time until the trial in August, 1955, he made no further attempt to work at any gainful occupation. Farley owns and lives on a 3-acre tract upon which he has his home and five duplexes which are rented by the month. A large part of the property is planted with nut trees. He has a flock of chickens. He has been mowing his lawn which is about half an acre in extent. For more than a year before the trial, at first five times and later three times per week, he drove his car to Portland for physiotherapy treatment, a round

trip of 24 miles. He admitted cleaning the chicken house and removing the meat from nuts raised on his place. The doctors testified that he was capable of doing light work, such as work in a service station, clerking in a store, the work of a salesman, watchman, etc., and they estimated his disability at about 50 per cent. From this we definitely conclude that Farley had been performing and was capable of performing far more work than he admitted in his testimony. There was no testimony that anyone other than his wife and himself performed the maintenance work in connection with his properties. This job in the maintenance of his place made it unnecessary for him to seek other employment. Dr. Berg, Farley's witness, in answer to a question by the court (Tr. 293), testified that Farley's condition had become stationary within the three months preceding the trial. During that period he had been capable of light work and had sought none.

Since 1952 there had been a great reduction in the jobs available for American seamen. Morgan, chief officer of the "Augustin Daly" at the time of the accident was at the time of taking his disposition (February 10, 1955) serving as an able seaman. He was a man 49 years of age and held a master's license. He testified that shipping was slack (Tr. 502-3).

After the Marine Hospital terminated medical treatment, Farley incurred expenses in the amount of $1285.45 which we admit to have been reasonable and necessary. The United States denies responsibility therefore, because of Farley's failure to comply with the statute permitting suit against the United States and be-

cause his injuries were the result of his failure to perform a duty which he owed the shipowner.

Farley was at the time of trial 61 years of age. While there are older men serving as marine engineers, the testimony indicated that they were usually chief engineers and Farley holds only a second assistant's license. His failure to qualify for a higher rating in about 30 years as a second assistant would justify the conclusion that he would not qualify thereafter. It would seem reasonable to conclude that Farley might anticipate some employment as a marine engineer until the age of 65 years. At that age he would qualify for his Social Security pension. His work expectancy could, therefore, not be said to exceed 7 years. The District Judge saw the libelant during the several days of the trial and heard the medical witnesses who testified regarding Farley's injuries. Based upon the observation of the witnesses and the weight which the court felt should be given to the testimony bearing upon Farley's injuries, the court found that he was entitled to an award of $8,000. The judge was in an excellent position to gauge and estimate the seriousness of Farley's injuries and the extent of his pecuniary loss. His findings on the amount of damages should not be disturbed.

The court awarded Farley maintenance at the rate of $8.00 per day for a period of nearly two years, totaling $5,816. In addition, Farley was awarded expenses of medical treatment in the amount of $1,357. The United States does not question the propriety of these amounts, assuming that the court had jurisdiction to make any award and that Farley's claim was not barred because of his neglect of his duty.

CONCLUSION

Appellee-appellant believes that Farley failed in his libel and in his proof to bring himself within the terms of the statute which permits suit against the United States. The terms upon which suit can be brought against the United States were determined by the Congress and cannot be enlarged upon by the courts. His suit should, therefore, be dismissed.

Appellee-appellant believes that the evidence established that Farley sustained his injuries by reason of his own breach of duty in failing to prevent Potts from climbing the ladder in a negligent manner. To award Farley damages for injuries resulting from his own breach of duty necessarily makes the Nnited States, as shipowner, an insurer against losses occasioned by injury. If this court holds that the District Court had jurisdiction, the suit should nevertheless be dismissed because the injuries were not occasioned by negligence on the part of the shipowner or unseaworthiness on the part of the ship.

Respectfully submitted,

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